STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA MOSSER,

Plaintiff-Appellant,

v

DIANNA PEPPER,

Defendant-Appellee.

UNPUBLISHED
March 11, 2010

No. 290093
Oakland Circuit Court
LC No. 2007-084770-NO

Before: Servitto, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Plaintiff Patricia Mosser appeals as of right from a circuit court order granting summary disposition for defendant Dianna Pepper under MCR 2.116(C)(10). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id*. at 31. Further, whether defendant owed plaintiff a duty is a question of law that this Court reviews de novo. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

To establish a prima facie negligence claim, a plaintiff must show: (1) that the defendant owed a duty of care, (2) that the defendant breached that duty, (3) that the plaintiff suffered injury, and (4) causation. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). "[A] negligence action may be maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect [the plaintiff] against unreasonable risks of harm." *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002). Whether there exists a legal duty is an issue to be decided by the trial court as a matter of law. *Id.*

Generally, "there is no legal duty obligating one person to aid or protect another." *Id.* at 493. An exception to this general rule exists, however, when a plaintiff and defendant share a

special relationship. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). Examples of special relationships include a common carrier to its passengers, an innkeeper to his guests, and owners and occupiers of land to their invitees. *Id.* "The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety." *Id.* "Thus, the determination whether a duty-imposing special relationship exists in a particular case involves the determination whether the plaintiff entrusted himself to the control and protection of the defendant, with a consequent loss of control to protect himself." *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 9; 492 NW2d 472 (1992). Factors to consider when determining whether a special relationship giving rise to a legal duty exists in a particular case include the societal interests involved, the severity of the risk, the burden on the defendant, the foreseeability of harm, the likelihood of occurrence, the plaintiff's inability to protect herself from the harm, whether the plaintiff bestowed an economic benefit on the defendant, and the defendant's ability to comply with the proposed duty. *Id.*

Applying these principles in this case, the evidence fails to establish that plaintiff entrusted herself to defendant's control and protection, with a consequent loss of control to protect herself. *Williams*, *supra* at 499. Plaintiff resided with defendant temporarily to give plaintiff's daughter, Carol, "a break." Plaintiff had been residing with Carol because Carol lived relatively close to Havenwyck Hospital where plaintiff was receiving follow-up care. Plaintiff was able to care for herself and was home alone while defendant, defendant's husband, and defendant's adult daughter worked full time. Plaintiff was able to administer her own medications that Carol had separated out for her in a container. Defendant did not derive any economic benefit from plaintiff residing with her and believed that plaintiff was physically able to mount a bicycle.

Plaintiff herself admitted that she was able to function normally before her fall and was able to perform normal daily activities. She maintained that her balance was her only problem, but that it was not a serious problem and resulted in her feeling light-headed only on rare occasions. Nothing in the record indicates that defendant exercised control over plaintiff or that plaintiff entrusted herself to defendant's control and protection. Likewise, nothing indicates that plaintiff suffered any loss of control to protect herself. The record fails to show that plaintiff was unable to leave defendant's residence at any time if she had chosen to do so. See *Dykema*, *supra* at 10. Thus, the evidence fails to establish a special relationship giving rise to a duty as a matter of law.

Plaintiff argues that defendant's motion should have been brought under MCR 2.116(C)(8) instead of subrule (C)(10). This Court has previously recognized that summary disposition in a negligence action is appropriate under subrule (C)(8) "if it is determined that, as a matter of law, the defendant owed no duty to the plaintiff." *Otero v Warnick*, 241 Mich App 143, 147; 614 NW2d 177 (2000). Nevertheless, because the parties limited their arguments in the trial court to subrule (C)(10) and the court considered documentary evidence outside the pleadings in rendering its decision, the trial court did not err by granting summary disposition under subrule (C)(10) as opposed to (C)(8).

Plaintiff also argues that defendant owed her a duty because she voluntarily agreed to act as her caregiver. We disagree. "A party may be under a legal duty when it voluntarily assumes a function that it is not legally required to perform." *Zychowski v A J Marshall Co, Inc*, 233 Mich App 229, 231; 590 NW2d 301 (1998). Once a person assumes a duty, that duty must be carried out with a degree of skill and care so as not to unreasonably endanger another. *Id.*; *Schenk v Mercury Marine Div, Lowe Industries*, 155 Mich App 20, 25; 399 NW2d 428 (1986). Further, "[i]t is not enough that an individual simply acts. The act must have been one to render service to another." *Id.* "[T]he evidence must show that the actor assumed an obligation or intended to render services for the benefit of another. Evidence demonstrating merely that a benefit was conferred upon another is not sufficient to establish an undertaking which betokens duty." *Smith v Allendale Mut Ins Co*, 410 Mich 685, 717; 303 NW2d 702 (1981).

Here, the evidence fails to show that defendant assumed an obligation to render services for plaintiff's benefit. Rather, defendant merely agreed to allow plaintiff to reside with her temporarily to give Carol "a break." Plaintiff was capable of taking care of herself and administering her own medications from the container in which Carol had placed them. Although defendant assisted plaintiff with her "homework" regarding her obsessive compulsive disorder therapy, there is no evidence that defendant assumed an obligation to do so. Although plaintiff may have received a benefit in this regard, evidence demonstrating that a benefit was conferred is insufficient to establish an undertaking, which connotes the existence of a duty. *Smith*, *supra* at 717. Because the record fails to establish that defendant assumed a duty to render services to plaintiff, summary disposition on this theory is also appropriate.

Affirmed.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood